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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-545

UNITED STATES STEEL CORPORATION, Petitioner
v.
DAVID P. BLAIR, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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NO. 71-545

UNITED STATES STEEL CORPORATION, Petitioner

v.

DAVID P. BLAIR, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of Certiorari issue to review the judgment of the Court of Appeals for the Third Circuit which affirmed the judgment of the District Court assessing damages.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported but a copy thereof is appended hereto at page 15. The opinion of the District Court is reported at 312 F.Supp. 293 and is appended hereto at page 18.

JURISDICTION

The judgment of the Court of Appeals was entered June 21, 1971. A timely petition for rehearing in banc was denied July 20, 1971 and this petition was filed within 90 days of that date.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Where a longshoreman is injured while loading a barge temporarily tied up at his employer's landing for loading purposes, due to an alleged unseaworthy condition therein:

(a) can the longshoreman bring an action for damages against his employer because of such unseaworthy condition where the employer is neither the owner nor the bareboat charterer of the barge in question and has no operational interest in said vessel; or

(b) is the injured longshoreman's remedy under the Longshoremen's and Harbor Workers' Compensation Act exclusive insofar as the liability of the employer is concerned?

STATEMENT OF THE CASE

This is an admiralty action brought by the plaintiff to recover damages for personal injuries allegedly sustained by him while working as a pipe loader for the defendant on a barge located at defendant's landing on the Monongahela River at McKeesport, Pennsylvania (5a, 6a). The cause of action is asserted under the maritime doctrine of seaworthiness (6a).

Plaintiff was first employed by defendant, petitioner herein, at its National Tube Works in McKeesport, Pennsylvania in December, 1964 as a pipe loader in the Shipping Department (89a, 155a). Prior to February 7, 1967 his work had always been performed in the plant or surrounding area on the land or on railroad cars (88a, 89a, 156a). On February 7 and 8, 1967 defendant assigned plaintiff to assist in loading pipe in barges at defendant's barge loading area and according to defendant's records, plaintiff was engaged in that work on both days between the hours of 3 and 11 p.m. (153a, 155a, 164a).

The barges on which plaintiff worked on the two days mentioned were Barge No. 810 owned by A. L. Mechling Barge Lines, Inc. and Barges Nos. 388 and 456 owned by Ohio Barge Line, Inc. Of these barges, only Barge No. 810 was a jumbo covered barge (49a, 65a, 66a, 170a). Although the testimony in this case was to the effect that Barge No. 810 was owned by Mississippi Valley Barge Line Company, it was discovered since completion of the testimony that said barge was actually owned by A. L. Mechling Barge Lines, Inc.

The work of loading the barges with pipe was accomplished with the aid of a locomotive crane owned by defendant and operated by its employee, which crane was situated on top of the loading dock and the boom of which had attached to it a cable with sling device for carrying the pipe (270a, 271a). The pipe was secured from railroad cars brought to the dock area. After the load was obtained in the railroad cars, the crane operator would make a lift transporting the load over the dock area and lower it into the barge. The distance from the crane down to the barge was about 25 feet (271a).

Prior to plaintiff's being employed on the barges in question, said barges had been towed to defendant's landing by towing companies (174a). Said barges were placed at defendant's dock for the purpose of having them loaded with pipe and shipped by means of towing companies to various destinations. Although defendant did have limited possession and control of these barges while they were tied up at its landing for loading purposes, defendant had no authority to repair or maintain them and had no towing facilities for moving the barges (174a). Defendant's employees, however, did place navigation lights on the barges while they were tied to its landing, removed water from the barges if any accumulated therein and by means of pulleys could move the barges a short distance in its own dock so as to facilitate the loading thereof.

The plaintiff was one of a crew of four pipe loaders, the duties of which were to receive the pipe in the barge, unhook the slings, roll the pipe into place, secure the cargo and perform other miscellaneous functions in order to load the pipe into the barge and ready

the same for shipment. Other members of the pipe loading crew were Phillip Harrison, Joseph Fani and Robert Hamar, all employes of the defendant (165a, 166a).

The plaintiff and his witnesses, Phillip Harrison and Joseph Fani, contend that plaintiff's accident took place on February 13, 1967 between the hours of 11 p.m. and 7 a.m., while they were working for defendant on a jumbo barge owned by Ohio Barge Line, Inc. (34a, 49a, 57a, 65a). They contend that the accident took place as a sling loaded with pipe was being lowered into a partly loaded barge, the lift struck the edge of the barge and the wall of the dock all of which caused the plaintiff to jump from the tier of pipe upon which he was standing and fall on an accumulation of ice on the floor of the barge. Although Robert Hamar was working with plaintiff at the time involved, he testified that he knew of no accident befalling plaintiff at any time (353a, 354a).

The defendant contends herein that (1) plaintiff at no time sustained an accident while employed on any barge; (2) that since the barge upon which plaintiff alleges he was injured was owned by A. L. Mechling Barge Lines, Inc., defendant owes plaintiff no duty to provide him with a seaworthy vessel; and (3) that defendant's liability to plaintiff, if any, is for compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act (33 USCA § 901).

After testimony on behalf of the plaintiff had been completed in this case, defendant filed a Motion to Dismiss setting forth therein various reasons why defend-

ant was not laible to plaintiff in the within cause of action (159a). After argument thereon the lower court refused defendant's motion (160a).

This action was tried before Wallace S. Gourley, Senior District Judge, without a jury. On May 1, 1970 the court filed its Opinion, including findings of fact and conclusions of law and ordered that judgment be entered in favor of the plaintiff and against the defendant in the total amount of $95,000 (383a, 399a).

On May 11, 1970 defendant filed a motion requesting the court to alter, amend and set aside certain findings of fact and conclusions of law and judgment or, alteratively, for a new trial. After a hearing was held thereon the court entered an order dated June 3, 1970, reaffirming its findings of fact and conclusions of law entered on May 1, 1970 and denied defendant's motion in all respects (399a).

The Court of Appeals for the Third Circuit filed its per curiam opinion on June 21, 1970 affirming the judgment of the District Court. A timely petition for rehearing in banc was later filed by your petitioner herein but the same was denied on July 20, 1971. Under date of July 28, 1971 the Clerk of the Court of Appeals mailed to the parties involved a true and correct copy of the Court's judgment with costs taxed against your petitioner which was issued in lieu of a formal mandate.

REASONS FOR GRANTING THE WRIT

The Rulings Below Conflict With the Decisions of This Court and the Decisions of Other Courts of Appeal and Significantly Affect the Shipping Industry, Especially in the Inland Waters.

In the case of *Reed v. Yaka,* 373 U.S. 410, 10 L.Ed.2d 448 (1963), this Court for the first time held that a bareboat charterer was presumably liable for the unseaworthiness of the chartered vessel. In that case your Honorable Court stated at page 413 as follows:

> "Pan-Atlantic was operating the Yaka as demisee or bareboat charterer from Waterman. Under such arrangements full possession and control of the vessel are delivered up to the charterer for a period of time. The ship is then directed by its Master and manned by his crew; it makes his voyages and carries the cargo he chooses. Services performed on board the ship are primarily for his benefit. It has long been recognized in the law of admiralty that for many, if not most, purposes the bareboat charterer is to be treated as the owner, generally called owner pro hac vice. We have no doubt, and indeed Pan-Atlantic admits, that, barring explicit statutory exemption, the bareboat charterer is personally liable for the unseaworthiness of a chartered vessel, and that this liability will support a libel in rem against the vessel. . . ."

Prior to that decision the vessel owner alone owed to the longshoreman the nondelegable obligation to maintain a seaworthy vessel and as a result the longshoreman had the right to sue the vessel owner *in per-*

sonam or the vessel *in rem* for injuries caused by unseaworthiness. *Waterman Steamship Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421, 424, 5 L.Ed.2d 169 (1960).

In the case of *Jackson v. Lykes Steamship Company*, 386 U.S. 731, 18 L.Ed.2d. 488 (1967), this Court held that a longshoreman could sue his employer for the ship's unseaworthiness if said employer was the owner of the vessel, and, under those circumstances, the longshoreman was not relegated to the provisions of the Longshoremen's and Harbor Workers' Compensation Act as his exclusive remedy. In the within case there was no evidence of a demise or other form of charter between the owners of the barges involved and your petitioner herein. The barges involved were tied up in your petitioner's landing only for the purpose of having them loaded with pipe manufactured by your petitioner and they were at all times tied to said landing in order to facilitate loading. Your petitioner had no authority, nor was there any proof thereof, to navigate these barges except within the very narrow confines of its landing for the purposes of loading. The barges admittedly were owned by third parties which fact was testified to by the plaintiff and his witnesses. Although your petitioner did have temporary possession and control of the barges in question while the same were tied up and being loaded at its landing, your petitioner had no authority to navigate the same and no authority to make repairs thereto. In the case of *Guzman v. Pichirilo*, 369 U.S. 698, 8 L.Ed.2d 205 (1962), this Court held that in order to create a demise the owner of the vessel must completely and exclusively relinquish possession, command and navigation thereof to the demisee; that

a demise is therefore tantamount to, though just short of, an outright transfer of ownership. Anything short of such a complete transfer is a time or voyage charter party or not a charter party at all.

In its opinion affirming the judgment of the District Court in the instant case, the Court of Appeals cited the case of *Aird v. Weyerhaeuser SS Co.*, 169 F.2d 606 (3d Cir., 1948). In that case the question arose as to whether under a general agency service agreement a steamship company's authority as United States Agent to conduct business of vessels assigned to the company did not include control of navigation and management of the vessel or whether the company's responsibility was limited to that of "ship's husband". In his opinion, Circuit Judge Maris, at pages 609-610, explains the difference between a demise charter and a charter party. At page 611, however, he states as follows:

> ". . . On the other hand, however, are those demise charters under which the charterer is given sole possession and control of the vessel for the voyage or service which is contemplated. As we have seen it is only in the case of a charter of the latter sort that the charterer becomes owner pro hav vice and liable for the seamen's wages. There is, however, a general presumption that the owner does not mean to put his vessel into the possession of the charterer to this extent. Accordingly Aird would not be justified in relying upon the statement in the articles that Weyeshaeuser was charterer as a basis for holding it liable as his employer."

Reasons for Granting the Writ.

We sincerely believe that the Court of Appeals in the instant case was in error in citing Judge Marris' opinion as its basis for affirming the District Court in the instant case. The evidence in the instant case was not such that your petitioner could be considered to be a charterer of the barges involved and thus become owner *pro hac vice*. As stated in the opinion of Judge Maris, there is a general presumption that the owner of a vessel does not mean to put his vessel into the possession of the charterer to that extent. Since the barges in question were admittedly owned by third parties the burden of establishing necessary ingredients to constitute owner *pro hac vice* was upon the plaintiff in this case. There is no evidence establishing these necessary ingredients in the record in this case except that the barges involved had temporarily been placed in your petitioner's landing for loading.

We believe that the instant case is governed by the facts and law involved in *Watson v. Gulf Stevedore Corporation,* 374 F.2d 946 (5th Cir., 1967); cert. denied 389 U.S. 927 (1967) and the case of *Thomas v. Peterson Marine Service, Inc.,* 411 F.2d 592 (5th Cir., 1969); cert. denied 396 U.S. 1006. In the latter case the plaintiff was employed by defendant in the hold of the S/T MOBIL ACME, a vessel owned by Mobil Oil Corporation. At the time of his injury he was scooping excess coconut oil from the hold and his employer had exclusive control of that part of the ship. Plaintiff filed an action for damages under the Jones Act and general maritime law against his employer and the District Court granted summary judgment in favor of the employer. In affirming the granting of the summary judg-

ment in favor of the employer in its per curiam opinion, the court at page 593 stated as follows:

> "To exhaust appellant's possibilities for a suit in admiralty against his employer, we hold that as a longshoreman he is not entitled to sue Peterson Marine for the unseaworthiness of the vessel under the doctrine fashioned for longshoremen in Seas Shipping Company v. Sieracki, 1946, 328 U.S. 85, 66 S.Ct. 872 90 L.Ed. 1099 and Reed v Steamship Yaka, 1963, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448. An injured longshoreman who was doing work traditionally done by seamen can maintain an action for unseaworthiness, but such action must be against the vessel *in rem* or the owner of the vessel and cannot go directly against a stevedore-employer having no ownership or operational interest in the vessel. We so held in Watson v. Gulf Stevedore Corp., 5th Cir. 1967, 374 F.2d 946.
>
> "The summary judgment is in all respects affirmed."

The instant case is an important one to the shipping industry which uses our waterways, particularly the inland waterways, where thousands of barges are used in commerce on a daily basis. These barges are constantly used to carry cargo up and down the rivers and are deposited at landings for various periods of time, in connection with loading and unloading operations. Only in rare occasions does the landing operator who takes temporary custody of the barge have an operational or navigational interest in the barge, his sole interest being the loading or unloading of the barge in question. The barges are towed into and out of the

landing in question by third parties. Query: Does the landing operator who is not the owner of the barge in question and under such circumstances owe to the longshoreman who may be employed thereon the nondelegable obligation to maintain a seaworthy vessel? We do not believe it was ever intended or has previously been held that such temporary custody and control of a barge by the landing operator was ever intended to place upon him the liabilities of an owner *pro hac vice.* We submit that it is unreasonable to place such a heavy burden upon all such parties whose relationship to myriad barges is at most brief and temporary. The landing operator at most is no more than a bailee of the barges in question.

CONCLUSION

For these reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment of the Court of Appeals affirming the award of damages by the District Court.

Respectfully submitted,

REED, SMITH, SHAW & MCCLAY
GILBERT J. HELWIG
IRA R. HILL
Attorneys for Petitioner

October 16, 1971

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,214

DAVID P. BLAIR
v.
UNITED STATES STEEL CORPORATION,
Appellant

(D. C. Civil Action No. 67-1363)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued June 3, 1971
Before McLAUGHLIN, ALDISERT and GIBBONS,
Circuit Judges

Opinion of the Court
(Filed June 21, 1971)

PER CURIAM:

This appeal requires us to decide whether a bailee in exclusive possession of a river barge is an owner *pro hac vice* and thus liable for injuries to a stevedore whose injuries resulted from unseaworthiness of the vessel. The district court found that appellant was such an "owner" and awarded damages to appellee.

The barge was towed by a river boat company to appellant's dock in a river harbor. It was tied to the dock along with other barges and left in appellant's possession for the purpose of loading it with pipe. After tying up the barge, the boat company left the area. Barge handlers, employed by appellant, were responsible for movement of the vessel from various locations in the harbor by means of pulleys. Their duties also obliged them to place night warning lights on the moored barge.

Plaintiff, an employee of appellant, was one of four loaders whose job required him to receive the pipe which was lowered from the dock into the barge by crane. The loaders were to unhook the pipe from the crane sling and roll it into place on the barge. There was testimony that plaintiff was injured when the crane sling struck the side of the barge and the wall of the dock, causing him to jump from the tier of pipe on which he was standing and fall on an accumulation of ice on the deck of the barge. It was averred, and the district court found, that the accumulation of ice and the absence of sufficient illumination to disclose the presence of ice constituted unseaworthiness.

In *Aird v. Weyerhaeuser S. S. Co.*, 169 F.2d 606, 609-10 (3 Cir. 1948), this court stated:

> If the owner of the vessel has given entire possession and control of it to another *by virtue of a demise charter or otherwise* . . . the person thus put in possession and control of the vessel becomes special owner. . . . Such a person is frequently described as "owner pro hac vice" which is merely a convenient expression to indicate that he stands

in the place of the owner for the voyage or service contemplated and bears the owner's responsibilities, even though the latter remains the legal owner of the vessel.

(Emphasis supplied.)

There being no showing of an agreement between the owner of the barge and the appellant inconsistent with a demise, see *Banks v. Chas. Kurz Co.*, 69 F. Supp. 61, 66 (E.D. Pa. 1946), and there being sufficient evidence to sustain the district court's finding that appellant had possession and control of the barge, a finding which we do not consider clearly erroneous, *Speyer v. Humble Oil and Refining Co.*, 403 F.2d 766 (3 Cir. 1968), we are persuaded that the district court did not err in holding appellant liable as an owner *pro hac vice* for injuries sustained by a stevedore. See *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Reed v. The Yaka*, 373 U.S. 410 (1963); *Jackson v. Lykes Bros. Steamship Co., Inc.*, 386 U.S. 731 (1967).

We have considered the other contentions presented by appellant and find them to be without merit.

The judgment of the district curt will be affirmed.

A True Copy:

Appendix.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DAVID P. BLAIR
v.
UNITED STATES STEEL CORPORATION
No. 67-1363
In Admiralty

OPINION

WALLACE S. GOURLEY, Senior District Judge

This is an admiralty action brought by plaintiff to recover damages for personal injuries allegedly sustained by him while working on a vessel in the course of his employment as a stevedore or barge-loader for the defendant. A sole cause of action is asserted under the maritime doctrine of seaworthiness. Following the completion of pre-trial proceedings, a non-jury trial was conducted by this member of the Court. The testimony has been completed, the transcript filed, and proposed findings of fact and conclusions of law have been submitted by counsel for the respective parties. Based upon the complete record, I am of the opinion that judgment must be awarded in favor of plaintiff and against defendant. In support thereof, the Court sets forth the following:

FINDINGS OF FACT

Jurisdiction and Liability

1. Plaintiff was first employed by defendant at its National Tube Works in McKeesport, Pennsylvania, on December 29, 1964, as a pipe loader in the shipping

department. Prior to February 7, 1967, his work had always been performed in the plant or surrounding area, on the land or on railroad cars. Before the date of his accident he had never worked on a barge.

2. On February 7, 1967 and February 8, 1967, defendant assigned plaintiff to assist in loading pipe in barges moored in the Monongahela River at the defendant's barge-loading work between the hours from 3 P.M. to 11 P.M.

3. The Monongahela River is a navigable waterway of the United States.

4. The barges on which plaintiff worked on both dates were designated as MBL 810, OBL 388 and OBL 465. Of these only MBL 810 was a jumbo (large sized) covered (having movable lids) type barge.

5. Plaintiff's accident occurred during the performance of barge work on February 7, 1967. It was cold and after dark when the events took place which are the subject of this litigation. The barge being loaded at the time was a jumbo covered barge designated as MBL 810.

6. The work of loading the barge was accomplished with the aid of defendant's locomotive crane which was stationed on the dock and the boom of which had attached to it a cable and sling for carrying pipe. Defendant's crane operator would lift a load of pipe from railroad cars brought to the dock area, transport the load over the dock area and lower it into the barge. On an average, the crane carried a load of about ten tons. The distance from the top of the dock to the bottom of the barge was approximately twenty-five feet.

7. The plaintiff was one of a crew of four pipe loaders, the duties of which were to receive the pipe as lowered from the dock to the barge, unhook the slings, roll the pipe into place, place spacers, secure the cargo and perform other miscellaneous functions in order to accomplish the loading of pipe in the barge.

8. In order to perform his duties, it was necessary for the plaintiff to be in the bottom of the barge. It was neither feasible nor possible for him to leave the bottom of the barge during the time a lift was being made, there being no means of egress afforded.

9. Plaintiff had never been instructed concerning barge loading operations and was unfamiliar with the procedures followed or events that could be expected to arise during loading.

10. The pipe was being loaded in the barge in several tiers. Plaintiff was working on top of the first tier of pipe along with Harrison and Hamar. Fani was laying bearings strips in the second tier in which there was some pipe.

11. Between the tiers was an open space.

12. The distance from the top of the tier of pipe upon which plaintiff was standing to the floor of the barge between the two tiers of pipe was six to eight feet.

13. On the floor of the barge in the space between the tiers there was an accumulation of ice six to eight feet long and four feet wide, or at least four feet in diameter.

14. Although one of the fellow employees had discovered said icy condition plaintiff had not been told

about said condition nor had he noticed or seen the same. This was unquestionably due to the poor and insufficient lighting in the loading area and more particularly on the barge vessel.

15. The lighting was such that various areas of the barge were in shadow or darkness. Although there were lights on the dock wall and upon poles situated on the dock, there were no lights on the barge for illuminating the work area. Portable or artificial lights were not placed or temporarily installed on said barge or any other barges being loaded. In fact, it was the defendant's practice not to do so in any barge being loaded.

16. The accident occurred as a sling loaded with pipe was being lowered into the barge. As the lift was brought down, a swing began to develop. The lift banged or struck the edge of the barge, then contacted or was brought up against the wall of the dock, and then started down into the barge.

17. Harrison, who had fourteen years experience and was working with plaintiff on top of the tier, thinking that the lift might "get away", ran to the outside corner of the barge where he knew he would be out of reach of a swinging lift. Hamar also went to this location.

18. Plaintiff, fearing that the load would break loose and fall upon him, jumped from the tier of pipe on which he was standing to the floor of the barge and landed on the accumulation of ice which was in the area between the tiers. He slipped, landing in a sitting position and his head jerked back. As a result, he was injured.

18. Although it was customary for a locomotive-crane operator, on occasion, check the swing in a lowered lift by bringing the lift gently against the barge wall, plaintiff, inexperienced and uninstructed in barge operations, honestly believed he was involved in a sudden emergency as a result of the course of the swinging lift, both before and after it struck the barge wall. Plaintiff was never told, informed or advised of said custom. The sudden emergency in which the plaintiff become involved was not the result of his own neglect or lack of care in any way whatsoever.

20. The ownership of the barge vessls has not been firmly established, although it appears certain that it was not owned by defendant at the time of the accident. This fact is immaterial, in my considered judgment. It matters not whether the defendant was the owner, charterer, lessee or bailee of the barge vessel or whether defendant had a right of possession on an hourly, daily, yearly or monthly basis. Since the barge vessel was in the sole and absolute control of the defendant, liability for the unseaworthy condition must exist against said defendant.

21. At and prior to the time of the accident, the barge in question was one of a group of barges at the defendant's plant. It was one of five barges moored in the loading area.

22. The barges are customarily delivered to the defendant by river boat companies. They may be tied up either by a river boat company crew or by defendant's own crew of barge handlers. After the barges are tied up, a river boat company's crew leaves.

23. The defendant's barge handlers have different duties than the barge loaders and are directed by defendant's supervisors. Their duties include moving the barges. Defendant's barge shipper has the responsibility of directing the placement of the barges for loading at appropriate times. To accomplish this purpose he contacts the supervisor of the crew of barge handlers who are then charged with the duty of moving the barges from a given location within the river loading area where they may be moored to the specific location adjacent to the dock where they may be loaded. This movement is accomplished with the use of pulleys, drawn upon manually or by locomotive crane, but without the use of motor-powered vessels.

24. Defendant's barge handlers are responsible for the maintenance of the barges themselves to the extent that they have duties of pumping out the barges with a steam pump if they are found to be accumulating water and of placing red navigational warning lights upon the barges.

Damages

25. The medical testimony is most substantially disputed as to the injuries sustained, the present condition of plaintiff, and his ability to pursue regular and steady employment in the type or class of work for which he is mentally and physically qualified and experienced.

26. Although over a period of years plaintiff had been involved in some motor vehicle accidents, he sustained no substantial injury in any of them, had never sustained any injury to his neck or back and was in excellent health prior to the accident.

27. While plaintiff reported the accident belatedly to his superiors, the accident was known to plaintiff's fellow barge-loaders. A more prompt report of the accident could not have been expected because plaintiff's initial symptoms and pain were not localized in the specific areas in fact injured, and a causal connection between the accident and injury was not discovered by plaintiff until later.

28. Plaintiff's work record prior to the accident was good, he being a willing and cooperative worker at all times.

29. As a result of the accident, plaintiff sustained an injury to the neck for which he has received medical treatment to date, principally from the following doctors: Dr. C. Ramaswamy, Dr. Patrick G. Laing, Dr. James Rosen and Dr. Ruber Tenicella.

30. Dr. Ramaswamy first saw plaintiff on February 20, 1967. Dr. Ramaswamy immediately prescribed cervical traction and thereafter caused the plaintiff to be admitted to the Charleroi-Monessen Hospital on two occasions with a diagnosis of herniated cervical disc. During the first hospitalization plaintiff was treated with cervical traction, medication and physiotherapy. During the second hospitalization, his neck pain having grown worse, he had further conservative therapy followed by surgery during which a herniated disc at the level of C6 and C7 disc space was removed by anterior surgery. A fusion graft was obtained from the hip region and applied to the area of disc removal. He was followed by Dr. Ramaswamy after his discharge from the hospital, having continuing complaints of pain in

the left shoulder, arm and fingers which were not relieved.

31. Dr. Ramaswamy received a belated history of plaintiff's accident but was definitely positive that Mr. Blair's problem was secondary to the injury and that his condition was caused by the accident.

32. Plaintiff next came under the care of Dr. Laing, another orthopedic surgeon, on October 30, 1967. He caused Mr. Blair to be hospitalized also on two occasions at Presbyterian-University Hospital, on the first of which a manipulation of the cervical spine was performed and other procedures, such as traction and physiotherapy, administered. This was done to alleviate plaintiff's pain in his neck, shoulders and left chest. When improvement was not maintained, he was again hospitalized for further studies and physiotherapy and a Mayo-type cervical collar was prescribed. The diagnosis made by Dr. Laing was cervical degeneration with nerve root pressure. In his opinion, also, this condition was caused by the accident and is not relievable by further operations or other procedures.

33. Dr. James Rosen, a neurologist, also attempted to treat plaintiff for his continued posterior cervical pain, left upper extremity and chest. He caused plaintiff to be re-hospitalized for further studies, including a myelogram, and subsequently arranged for the plaintiff to undergo various nerve blocking procedures by Dr. Tenicella. In his opinion, plaintiff's condition was caused by the trauma of the accident and was diagosed as chronic post-traumatic syndrome with cervical fibro-myositis. In spite of the nerve blocks, plaintiff's painful condition has not been relieved, the

nerve blocks administered having afforded Mr. Blair only temporary relief.

34. Although continued nerve blocks hold out some slim prospect of relief, they are attended with grave risk of paralysis or death and are not recommendded at least without very extensive supportive measures.

35. Plaintiff's condition is permanent.

36. As a result of the fusion operation, plaintiff's ability to turn his head is limited on either side to the extent of fifteen or twenty degrees.

37. Because of his injuries, plaintiff is permanently incapacitated from performing heavy work. Because of the pain he now experiences, he is also unable to engage in any sustained kind of physical activity even of a light nature which involves physical exertion.

38. By reason of his residual disability and/or the performance of surgery as revealed by the presence of a cervical scar, it will be difficult for plaintiff to secure a job.

39. Plaintiff had completed only eight grades of formal education. His entire work history prior to his employment by defendant had involved work of heavy nature such as laborer, gas station attendant, truck driver, factory worker, steel hauler, construction worker and cattle hauler.

40. Since the accident has activities have been limited to doing work around his yard and house cleaning. He attempts to work and can only do so for a short period of time before developing pain and stiffness

which require him to stop. The pain he experiences is constant and often keeps him awake at night.

41. Plaintiff experienced extreme pain before, during and following his five hospitalizations and the administration of various procedures such as myelogram and nerve blocks. His pain has been on a regularly recurring basis from the date of the accident to the present and will continue in the future.

42. Because of his injuries, plaintiff lost work from February 18, 1967 and has been continually unable to work thereafter. As of the date on which the trial was completed, November 7, 1969, he had been absent from work two years and approximately eight and one-half months. The plaintiff's hourly rate as a pipe loader at the time of the accident was $2.604 per hour. In the year immediately preceding the accident (from pay period ending January 8, 1966 to pay period ending January 7, 1967) he had earned, according to the defendant's records, $5,465, an average of $455 per month. On such basis, his wage loss as of November 7, 1969, the date of completion of the trial, was approximately $14,597.

43. By reason of his long absence from his work, his service with the defendant has been terminated because of agreements governing employees between the company and the union. In order to be re-employed by United States Steel Corporation, he would have to submit an aplication as a new employee and pass a physical examination. He would not be employed by defendant.

44. The plaintiff was born on February 3, 1931. He was thirty-eight years old at the time of trial, having, according to Life Tables published by the United

States Department of Health, Education and Welfare, an expectancy of 33.4 years. Plaintiff's retirement from defendant's service was mandatory at age seventy, although after age sixty-five continued employment was subject to his passing semi-annual physical examinations. His work life expectancy was thus thirty-two years. Plaintiff's proved earning capacity was $5,465 per annum and on that basis his gross future earnings, except for his disability, would be $174,880. The present worth of $5,465 per annum for thirty-two years at a discount rate of five and one-half percent is $81,451.45*.

45. Plaintiff incurred extensive bills in connection with the rendition of necessary medical and surgical treatment for his injuries and for numerous hospitalizations in the total sum of $5,188.84. The aforementioned bills were directly related to the plaintiff's injuries and all were established by proper evidence as being necessary to further the plaintiff's recovery and were reasonable in amount.

CONCLUSIONS OF LAW

Jurisdiction and Liability

1. This Court has jurisdiction pursuant to Title 28 U.S.C. §1333.

2. Barge MBL 810, although without motor power of its own, was a vessel within the meaning of the Maritime Laws of the United States. *Norton v. Warner Co.*, 321 U.S. 565, 64 S.A. 747, 88 L.Ed 931 (1943).

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*Factor 14.9042 taken from Present Value Tables published by Lawyers and Judges Publishing Co., Inc., Copyright 1968.

3. Unseaworthiness is created where a given condition temporarily renders the vessel, its equipment and appurtenances, unseaworthy, and no valid distinction is to be drawn between operational negligence and unseaworthiness. *Mascuilli v. United States,* 387 U.S. 237, 87 S. Ct. 1705, 18 L.Ed. 2d 743 (1967), *Canadians v. Moore-McCormack Lines, Inc.* 382 F.2d 961 (2d Cir. 1967) *cert. den.,* 390 U.S. 1027 (1968), *Alexander v. Bethlehem Steel Corporation,* 382 F.2d 963 (2d Cir. 1967), *cert. den.,* 393 U.S. 1064 (1969).

4. The duty to provide a seaworthy vessel includes a duty to provide both seamen and longshoremen with a safe place to work and this obligation extends to stowage where men perform loading and unloading. *Venable v. A/S Det Forenede Dampskibaselskab,* 399 F.2d 347 (4th Cir. 1968).

5. On February 7, 1967, plaintiff suffered an accident and injury which were caused by the following conditions, each of which rendered the vessel unseaworthy:

(a) An accumulation of ice on the floor of the barge in the area between the tiers on one of which the plaintiff was working;

(b) The absence of lights upon the barge itself which were necessary in order to illuminate the entire area and which would have eliminated areas of darkness in which it was likely that dangerous icy and slippery conditions would exist. The need for such additional lighting on the barge itself was increased due to insufficient lighting emanating from the dock and because, under defend-

ant's practices, no effort was made to eliminate ice from the interior of the barge.

6. The barge vessel on which the plaintiff sustained his injuries was not owned by the defendant. It was, however, in the exclusive control and possession and under the direction of said defendant. Regardless of the basis for its possession, the defendant is responsible for its unseaworthy condition and for the injuries and damages arising from said lack of seaworthiness.

7. By virtue of performing functions of moving barge MBL 810 and others within the dock area, pumping the barges when excess water accumulated, and maintaining navigational lights upon said barges, defendant exercised a possession and control of said vessels exceeding that delegated to a mere bailee and acquired an operational and navigational interest in said vessels. *Watson v. Gulf Stevedore Corporation,* 374 F.2d 946 (5th Cir. 1967), *cert. den.,* 389 U.S. 927 (1967), *Petition of Shaver Transportation Company,* 287 F. Supp. 339 (D. Oregon 1967), *Mach v. Pennsylvania R. Co,* 207 F. Supp. 233, (D.C. Pa. 1962), *aff'd* 317 F.2d 761 (3rd Cir. 1963)

8. In view of the defendant's possession, control and use of the unseaworthy barge vessel, it had an operational and navigational interest therein. Since the plaintiff was performing navigational and operational as well as stevedoring functions, it is liable to plaintiff in damages for unseaworthiness under the decision of the Supreme Court of the United States in *Reed v. The Yaka,* 373 U.S. 410, 83 S. Ct. 1349.

Damages

9. According to the weight of the medical testimony, plaintiff must be considered to have a disability which is partial and permanent, precluding plaintiff from both heavy and most light physical work. His economic horizon is most limited in the competitive industrial market.

10. The plaintiff has incurred great medical and hospital expenses, has lost substantial wages, has a substantial permanent partial disability, and has, is and will continue to experience throughout the span of his life most grievous and nerve racking pain, suffering and inconvenience which is substantially aggravated on sustained physical effort and application of the use of the physical functions of his body.

DISCUSSION

The law is settled that the owner of a vessel or bareboat charterer is responsible in damages for unseaworthiness to an employee-longshoreman who is injured while engaged in loading a vessel on behalf of said owner or charterer. *Reed v. The Yaka,* 373 U.S. 410, 83 S. Ct. 1394, 10 L.Ed. 2d 1962).

It is also well recognized that a ship owner's warranty of seaworthiness extends to a longshoreman while loading a vessel even where employed by an independent contractor. *Seas Shipping Co. v. Vieracki,* 328 U.S. 85, 66 S. Ct. 872, 90 L.Ed. 1099 (1946).

In determining whether to extend the doctrine heretofore enunciated to the facts in this case, the Court has considered what must be brought to the fore-

front at all times—the humaritarian policy of the doctrine of seaworthiness.

Consideration must be given to the hazards of marine service, the helplessness of the men to learn or know of, and ward off, the perils of unseaworthiness, especially in the night time and when sudden emergencies arise during the performance of their duties and the furtherance of the business interests of their employer.

It must also be remembered that the doctrine of seaworthiness cannot be held to depend upon any kind of contract between the owner of the vessel or barge. I believe that the person, individual or corporation who has not only a bailee's custody but also operational and navigational control of a vessel is subject to the doctrine of seaworthiness. This should be true regardless of the formal contractual relationship which exists between the owner of the vessel and the person having the aforementioned degree of control when a person working on the vessel is involved in an accident and injured.

The plaintiff in this proceeding, who was an employee of the defendant and was injured while working on a barge, cannot be denied the traditional and basic protection of the warranty of seaworthiness because the defendant, U. S. Steel Corporation, was not the owner or charterer of the vessel.

I, therefore, conclude that the defendant, which had the operational and navigational control over, as well as the possession, custody, use and management of the barge, is subject to and responsible under the seaworthiness doctrine.

To find otherwise would be to permit the remedial effects of the doctrine of seaworthiness to be limited or escaped by formalistic contracts, agreements, arrangements and understandings. This cannot be permitted, since the duty to provide a seaworthy vessel is rooted, not in contracts, but in the hazards of the work of the person required to go upon the vessel to perform duties and pursue his employment at all times of the day and night and varying conditions and circumstances. All such persons are subject to the same dangers and are entitled to like treatment under the law regardless of what the business relationship might be between an owner of a barge and a person who has operational and navigational control of said vessel. A person injured on a vessed should not be placed in a position where he is playing "Russian roulette", so to speak, as to what the relationship might be between the owner of the vessel and his employer at the time the employee is involved in an accident and injured.

Under the Federal Employers Liability Act, a railroad using equipment which is defective is responsible for injuries sustained by its employees regardless of the ownership of said equipment by a third person where it is defective and not suitable or fit for the purposes intended. *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1 (1962). I fail to see or find any reason why the same rule of law should not be applied or exist where a person is injured on a vessel which is in navigation on the inland waterways, that is at dock side for the purpose of being loaded, where an accident occurs and injuries are sustained as a direct result of the unseaworthy condition of said barge vessel.

It is therefore concluded that the employee of the defendant corporation is entitled to the application of the doctrine of seaworthiness to his employer.

ORDER

Now, this 1st day of May, 1970, it is hereby ORDERED that judgment be entered in favor of plaintiff and against defendant in the total sum of $95,000, in compensation for plaintiff's medical and hospital expenses, past wage loss, pain and suffering, and loss of earning power resulting from a permanent partial disability.

/s/ WALLACE S. GOURLEY, SDJ

Senior District Judge

cc: PAUL E. MOSES, Esquire
EVANS, IVORY & EVANS
711 Frick Building
Pittsburgh, Pennsylvania 15219

REED, SMITH, SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania 15230

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,214

DAVID P. BLAIR
v.
UNITED STATES STEEL CORPORATION,
Appellant

(D. C. Civil Action No. 67-1363)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: MCLAUGHLIN, ALDISERT and GIBBONS,
Circuit Judges

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 1, 1970, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

THOMAS QUINN
Clerk

June 21, 1971

Costs taxed in favor of appellee as follows:

Brief for appellee.....$174.90

Certified as a true copy and issued in lieu of a formal mandate on July 28, 1971.

TEST:

THOMAS F. QUINN
Clerk, United States Court of
Appeals for the Third Circuit.